

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA

Plaintiff,

v.

ROBERTO GUIZAR-SOLANO,

Defendant.

NOS. CR-09-6019-RHW  
CV-10-5061-RHW

**ORDER DISMISSING  
DEFENDANT'S MOTION  
UNDER 28 U.S.C. § 2255  
PURSUANT TO RULE 4**

Before the Court is Defendant Roberto Guizar-Solano's Motion for Time Reduction by an Inmate in Federal Custody under 28 U.S.C. § 2255 (Ct. Rec. 30). Defendant is currently incarcerated at the California City Correctional Center (Ct. Rec. 27). Defendant pleaded guilty to illegal reentry, in violation of 8 U.S.C. § 1326 (Ct. Rec. 26), and was sentenced by this Court to 34 months incarceration, 3 years supervised release, and a \$100 special penalty assessment (Ct. Rec. 27). Judgment was entered on June 17, 2010 (Ct. Rec. 27). Defendant appealed neither his conviction nor his sentence. Defendant's motion to vacate, set aside, or correct sentence was filed on June 7, 2010 (Ct. Rec. 30).<sup>1</sup>

Under 28 U.S.C. § 2255, a federal prisoner may move the court to vacate, set aside, or correct his or her sentence on the grounds that: (1) the sentence was

---

<sup>1</sup> Because less than a year has passed since entry of final judgment, Defendant's motion is not time barred. *See* 28 U.S.C. § 2255.

**ORDER DISMISSING DEFENDANT'S MOTION UNDER 28 U.S.C. § 2255  
PURSUANT TO RULE 4 \* 1**

1 imposed in violation of the Constitution or laws of the United States; (2) the court  
2 was without jurisdiction to impose such sentence; (3) the sentence was not  
3 authorized by law; or (4) issues of collateral attack. “Unless the motion and the  
4 files and records of the case conclusively show that the prisoner is entitled to no  
5 relief, the court shall cause notice thereof to be served upon the United States  
6 attorney.” 28 U.S.C. § 2255.

7 Pursuant to Rule 4 of the Rules Governing Section 2255 Proceedings for the  
8 United States District Courts (“Rule 4”), the Court must independently examine a §  
9 2255 motion to determine whether summary dismissal is warranted. Dismissal is  
10 appropriate if the movant’s allegations, “viewed against the record, either fail to  
11 state a claim for relief or are so palpably incredible or patently frivolous as to  
12 warrant summary dismissal.” *Marrow v. United States*, 772 F.2d 525, 526 (9th  
13 Cir. 1985). If it plainly appears from the record that Defendant is not entitled to  
14 relief, the Court shall issue an order summarily dismissing the cause of action.  
15 Rule 4. If, on the other hand, the Court determines that Defendant may be entitled  
16 to relief, the Court shall enter an order requesting the United States Attorney to file  
17 an answer. *Id.*

18 Defendant asserts that his sentence should have been reduced under U.S.S.G.  
19 § 5K2.0 because he accepted a final deportation order. Defendant also argues that  
20 he should receive a reduction in his offense level because as an illegal alien, he is  
21 not eligible for certain community confinement programs and cannot be housed in  
22 a minimum security facility. This claim could be construed as either a section  
23 2255 challenge to the District Court’s failure to depart downward based on  
24 Defendant’s alien status or a 28 U.S.C. § 2241 equal protection challenge to the  
25 Bureau of Prison’s execution of his sentence.

26 Nonconstitutional sentencing errors that have not been raised on direct  
27 appeal are considered waived and generally may not be reviewed by way of a  
28 motion under section 2255. *United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir.

1 1995); *but cf. United States v. Vgeri*, 51 F.3d 876, 882 (9th Cir. 1995) (stating  
2 limited exception for ineffective assistance of counsel claims). Accordingly,  
3 Defendant's claim that he should be granted a downward departure fails because  
4 Defendant failed to raise this issue on appeal.

5 Defendant alternately casts his sentencing error claim as an equal  
6 protection or due process violation. These claims may be construed as a federal  
7 prisoner's challenge to the execution of his sentence. *See* 28 U.S.C. § 2241. These  
8 constitutional claims, however, fail on the merits. The Ninth Circuit has held that  
9 the Bureau of Prisons' determination that prisoners with immigration detainers are  
10 not eligible for the community confinement benefits outlined in 18 U.S.C. §  
11 3625(c) is not a violation of due process or equal protection. *See McLean v.*  
12 *Crabtree*, 173 F.3d 1176, 1184-86 (9th Cir. 1999) (holding that the Bureau of  
13 Prisons' exclusion of prisoners with immigration detainers from eligibility for  
14 sentence reduction or community confinement does not violate equal protection or  
15 due process), *cert. denied*, 528 U.S. 1086 (2000).

16 Accordingly, **IT IS HEREBY ORDERED** that, pursuant to Rule 4, the  
17 Defendant's Motion for Time Reduction by an Inmate in Federal Custody under 28  
18 U.S.C. § 2255 (Ct. Rec. 30) is **DENIED**.

19 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
20 Order, forward a copy to the *pro se* Defendant, and **close the files**.

21 **DATED** this 4<sup>th</sup> day of August, 2010.

22  
23 s/Robert H. Whaley  
24 ROBERT H. WHALEY  
25 UNITED STATES DISTRICT JUDGE  
26

27 Q:\CRIMINAL\2009\Guizar-Solano\2255.deny.ord.wpd  
28